

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ALPS PROPERTY & CASUALTY  
INSURANCE COMPANY, a foreign  
insurer,

Plaintiff,

v.

KIRK D. MILLER, an individual,  
KIRK D. MILLER, P.S., a Washington  
Professional Service corporation,  
BRIAN CAMERON, an individual,  
SHAYNE SUTHERLAND, an  
individual, and CAMERON  
SUTHERLAND PLLC, a Washington  
Professional Limited Liability  
Company,

Defendants.

CASE NO. 2:22-CV-0064-TOR

ORDER GRANTING PLAINTIFF'S  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND  
DENYING DEFENDANTS'  
MOTION FOR PARTIAL  
SUMMARY JUDGMENT

BEFORE THE COURT are Defendants' Motion for Partial Summary  
Judgment Regarding Duty to Defend (ECF No. 29) and Plaintiff's Motion for  
Partial Summary Judgment (ECF No. 41). Plaintiff's Motion was submitted for  
consideration with oral argument on September 27, 2022. Nicholas C. Laboda and

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND DENYING DEFENDANTS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT ~ 1

Bradley E. Smith appeared on behalf of Plaintiff/Counter-Defendant. Ryan Best, Kirk D. Miller, and Michael R. Merkelbach appeared on behalf of Defendants/Counter-Plaintiffs. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, Defendants' Motion for Partial Summary Judgment Regarding Duty to Defend (ECF No. 29) is **denied** and Plaintiff's Motion for Partial Summary Judgment (ECF No. 41) is **granted**.

### BACKGROUND

This case concerns a legal malpractice insurance dispute. ECF No. 1. On April 7, 2022, Plaintiff ALPS filed the present complaint seeking declaratory relief regarding insurance coverage. *Id.* Defendants filed counterclaims for cross-declaratory relief, breach of contract, promissory estoppel, and the breach of duty of good faith and fair dealing. ECF No. 7.

The parties filed motions for partial summary judgment regarding insurance coverage and Plaintiff's alleged duty to defend. ECF Nos. 29, 41. The parties filed their respective response and reply to each motion. ECF Nos. 44, 47, 49, 56. Except where noted, the following facts are not in dispute.<sup>1</sup>

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<sup>1</sup> The Court notes Defendants consistently object to Plaintiff's facts but oftentimes rely on the same facts in support of their own motion. *See, e.g.*, ECF Nos. 30 at 2, ¶ 3, 43 at 2, ¶ 4. The Court therefore considers them undisputed.

1 Kirk. D. Miller P.S. and Cameron Sutherland PLLC are law firms located in  
2 Spokane, Washington. ECF No. 43 at 2, ¶ 1. Plaintiff ALPS issued a  
3 PREFERRED Lawyers Professional Liability Policy of Insurance to Cameron  
4 Sutherland PLLC, policy number ALPS22052-3 that was in effect from August 30,  
5 2020 to August 30, 2021. *Id.*, ¶ 2. The Cameron Policy provides a \$100,000 each  
6 claim limit and a \$300,000 aggregate limit. *Id.* at 9, ¶ 29. As relevant here, the  
7 Cameron Sutherland Policy contains the following provisions:

## 8 **SECTION 1 – INSURING AGREEMENTS**

### 9 **A. COVERAGE**

10 Subject to the Limit of Liability, exclusions, conditions and other  
11 terms of this Policy, the Company agrees to pay on behalf of the  
12 Insured all sums (in excess of the Deductible amount) that the Insured  
13 becomes legally obligated to pay as Damages, arising from or in  
14 connection with a CLAIM FIRST MADE AGAINST THE INSURED  
AND FIRST REPORTED IN WRITING TO THE COMPANY  
DURING THE POLICY PERIOD, provided that all of the following  
conditions are satisfied:

- 15 1. The Claim arises from a Wrongful Act that occurred on or after the  
Retroactive Cover Date set forth in Item 2 of the Declarations

## 16 **SECTION 2 – DEFINITIONS**

17 B. Claim means a demand for money or services including, but not  
18 necessarily limited to, the service of suit or institution of  
arbitration or alternative dispute resolution proceedings against the  
19 Insured.

20 \*\*\*

1 G. Damages means any:

- 2 1. Monetary award by way of judgment or final arbitration, or any  
3 settlement; and ...

4 Damage does not mean nor include any:

- 5 3. Punitive, multiple, or exemplary damages, fines, sanctions,  
6 penalties or citations, including, without limitation, any consequential  
7 or incidental damages, attorney's fees or costs, or pre-judgment or  
8 post-judgment interest resulting therefrom, regardless against whom  
9 the same are levied or imposed and regardless of whether the same  
10 were levied or imposed in a separate matter or proceeding;

11 \*\*\*

12 Y. Professional Services means services or activities performed for  
13 and on behalf of the Named Insured or a Predecessor Law Firm and  
14 rendered solely to others as:

- 15 1. An Attorney in an attorney-client relationship on behalf of one or  
16 more clients applying the Attorney's specialized education,  
17 knowledge, skill, labor, experience, and/or training, including pro  
18 bono services

19 \*\*\*

20 BB. Wrongful Act means an actual or alleged:

- 1 Act, error or omission in Professional Services that were or should  
2 have been rendered by the Insured;

### 3 SECTION 3 – EXCLUSIONS

4 THIS POLICY DOES NOT APPLY TO ANY CLAIM ARISING  
5 FROM OR IN CONNECTION WITH:

- 6 A. Any dishonest, fraudulent, criminal, malicious, or intentionally  
7 harmful wrongful or harmful act, error or omission committed by,  
8 at the direction of, or with the consent of an Insured.

1 *Id.* at 9-11, ¶ 30.

2 ALPS issued a BASIC Lawyers Professional Liability Policy of Insurance to  
3 Kirk D. Miller, P.S., policy number ALPS24677-2 that was in effect from June 1,  
4 2021 to June 1, 2022. *Id.*, ¶ 3. The Miller policy provides a \$500,000 each claim  
5 limit and a \$500,000 aggregate limit. *Id.* at 9, ¶ 29. As relevant here, the Miller  
6 Policy contains the following provisions:

7 **SECTION 1 – INSURING AGREEMENTS**

8 **A. COVERAGE**

9 Subject to the Limit of Liability, exclusions, conditions and other  
10 terms of this Policy, the Company agrees to pay on behalf of the  
11 Insured all sums (in excess of the Deductible amount) that the Insured  
12 becomes legally obligated to pay as Damages, arising from or in  
13 connection with a CLAIM FIRST MADE AGAINST THE INSURED  
14 AND FIRST REPORTED IN WRITING TO THE COMPANY  
15 DURING THE POLICY PERIOD, provided that all of the following  
16 conditions are satisfied:

- 17 1. The Claim arises from a Wrongful Act that occurred on or after the  
18 Retroactive Cover Date set forth in Item 2 of the Declarations

19 **SECTION 2 – DEFINITIONS**

20 C. Claim means a demand for money or services including, but not  
necessarily limited to, the service of suit or institution of  
arbitration or alternative dispute resolution proceedings against the  
Insured.

\*\*\*

1 G. Damages means any:

2 2. Monetary award by way of judgment or final arbitration, or any  
3 settlement; and ...

4 Damage does not mean nor include any:

5 3. Punitive, multiple, or exemplary damages, fines, sanctions,  
6 penalties or citations, including, without limitation, any consequential  
7 or incidental damages, attorney's fees or costs, or pre-judgment or  
8 post-judgment interest resulting therefrom, regardless against whom  
9 the same are levied or imposed and regardless of whether the same  
10 were levied or imposed in a separate matter or proceeding;

11 \*\*\*

12 Y. Professional Services means services or activities performed for  
13 and on behalf of the Named Insured or a Predecessor Law Firm and  
14 rendered solely to others as:

15 2. An Attorney in an attorney-client relationship on behalf of one or  
16 more clients applying the Attorney's specialized education,  
17 knowledge, skill, labor, experience, and/or training, including pro  
18 bono services

19 \*\*\*

20 BB. Wrongful Act means an actual or alleged:

1 Act, error or omission by the Insured in the performance of  
2 Professional Services;

### 3 SECTION 3 – EXCLUSIONS

4 THIS POLICY DOES NOT APPLY TO ANY CLAIM ARISING  
5 FROM OR IN CONNECTION WITH:

6 B. Any dishonest, fraudulent, criminal, malicious, or intentionally  
7 harmful Wrongful Act committed by, at the direction of, or with  
8 the consent of an Insured.

1 *Id.* at 12-14, ¶ 35.

2 On or about October 29, 2019, Isaac Gordon filed a putative class action  
3 against Robinhood Financial LLC in Washington Superior Court alleging  
4 Robinhood had transmitted or assisted in the transmission of unsolicited text  
5 messages to Gordon in violation of Washington's Commercial Electronic Mail Act  
6 and Consumer Protection Act. *Id.*, ¶ 4. Mr. Gordon was represented by Brian  
7 Cameron and Shayne Sutherland of Cameron Sutherland PLLC and Kirk Miller of  
8 Kirk D. Miller. P.S. *Id.*, ¶ 5. Defendants dispute that this was Mr. Gordon's only  
9 representation as E. Michelle Drake and Sophia M. Rios of Berger Montague PC  
10 also represented Mr. Gordon from February 24, 2021 to July 27, 2021. ECF No.  
11 50 at 9-10, ¶ 5.

12 On November 13, 2019, Robinhood removed the action to this Court. ECF  
13 No. 43 at 3, ¶ 6. On December 10, 2019, Mr. Gordon filed an amended complaint  
14 in which he alleged that in July 2019 he received unsolicited commercial electronic  
15 text messages promoting Robinhood's brand and services and that he did not  
16 consent to the text messages. *Id.*, ¶ 7

17 On January 25, 2021, the Court granted Mr. Gordon's motion for class  
18 certification and appointed Mr. Gordon as class representative. *Id.*, ¶ 9.

19 On April 29, 2021, Mr. Gordon served his first discovery responses to  
20 Robinhood. *Id.*, ¶ 10. First, Mr. Gordon claimed on July 23, 2019, he received a

1 text message from the phone number 509-990-2672, he did not have a relationship  
2 with the sender, and he did not provide the sender with his phone number. *Id.*, ¶  
3 11. Second, Mr. Gordon provided a screenshot of a text message which included a  
4 “nathanb4727” referral code. *Id.*, ¶ 12. Third, Mr. Gordon claimed he received an  
5 additional text message from the phone number 406-202-3711 with a screenshot of  
6 the text message with the referral code “johnc2246” and that he was uncertain if he  
7 provided the sender with his number. *Id.* at 3-4, ¶ 13. Upon receipt of this  
8 discovery, Robinhood learned that the 509-990-2672 phone number with the  
9 “nathanb4727” referral code belonged to Nathan Budke. *Id.* at 4, ¶ 14. It was  
10 determined that Mr. Budke was a friend of class counsel Mr. Cameron’s son. *Id.*, ¶  
11 15. Robinhood learned that the 406-202-3711 phone number with the “johnc2246”  
12 referral code belonged to class counsel Mr. Cameron’s brother, John Cameron. *Id.*,  
13 ¶¶ 16, 17.

14 On May 17, 2021, Cameron Sutherland submitted a Notice of New Claim or  
15 Potential Claim to ALP regarding the Robinhood litigation. *Id.* at 9, ¶ 28.

16 On June 25, 2021, Robinhood filed a motion to decertify the class and  
17 disqualify class counsel, arguing Plaintiff’s counsel, Mr. Cameron, organized  
18 through his family and family friends, the referral of text messages. *Id.*, ¶ 18.  
19 Defendants assert that this is “factually disputed” by the Declaration of Brian  
20 Cameron. ECF No. 50 at 25, ¶ 18.



1 On July 26, 2201, ALPS responded to an email from Mr. Miller that stated  
2 hypothetically, ALPS would likely have a duty to defend until a coverage  
3 determination was made – this email was not related to the conduct at issue in this  
4 case. ECF Nos. 30 at 6, ¶ 19; 45-1 (email).

5 On July 27, 2021, the Court granted in part Robinhood’s motion,  
6 decertifying the class and remanding the action to state court. ECF No. 43 at 5, ¶  
7 19. The Court stated “serious issues have been raised as to consent and the role  
8 that class-counsel and his brother played in initiating the transmittal of the text  
9 message that forms the bases of Plaintiff’s suit. Further, the stripping of the  
10 surrounding text messages and deceptive answers to discovery provide additional  
11 grounds to disqualify plaintiff as class representative.” *Id.* In denying Plaintiffs’  
12 motion for reconsideration, the Court held: “Such fraudulent activities that the  
13 Court expressed concern over ... makes the initiation of this action frivolous from  
14 the start.” *Id.*, ¶ 20.

15 On October 8, 2021, the Spokane County Superior Court dismissed the case  
16 with prejudice, stating that “dismissal without prejudice would be pointless and  
17 futile because Plaintiff’s claim is frivolous” and that “dismissal with prejudice is  
18 warranted as a sanction due to Plaintiff’s frivolous claim and litigation  
19 misconduct.” *Id.*, ¶ 21.

1 On October 18, 2021, Robinhood filed a motion seeking sanctions against  
2 Cameron Sutherland, PLLC, Kirk D. Miller, P.S., Brian Cameron individually, and  
3 Kirk Miller individually for Robinhood's fees expended in defending against Mr.  
4 Gordon's frivolous claim. *Id.* at 5-6, ¶ 22.

5 On October 26, 2021, Kirk D. Miller P.S. submitted a Notice of New Claim  
6 or Potential Claim to ALPS on the basis of the allegations in Robinhood's motion  
7 for attorney's fees. *Id.* at 12, ¶ 33.

8 In November 2021, ALPS determined the there was no coverage under  
9 either policy due to the definition of "damages" excluding sanctions and attorney  
10 fees. ECF No. 30 at 3-4, ¶¶ 9, 12.

11 On March 10, 2022, the Spokane County Superior Court issued an order on  
12 Robinhood's motion for attorney's fees:

13 Based on the uncontested evidence in the record, the federal court  
14 determined that Mr. Gordon's case was "frivolous from the start."  
15 The Plaintiffs requested clarification as to whether the federal court's  
reference as such was dicta, Judge Rice unequivocally removed any  
doubt that it was *not* dicta.

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16 Mr. Gordon and his counsel had been on notice that Robinhood  
17 intended to seek sanctions for a frivolous claim. The initial  
18 complaint, the amended complaint, the motion for class certification  
19 and supporting declaration claimed that Mr. Gordon received an  
20 "unsolicited" text message that he "did not consent" and that he did  
not know where it came from. As ultimately learned in discovery,  
these statements are not true. Given the close relationships of the  
people involved in this case and others, it is difficult to believe those  
involved did not know that the statements were untrue. In any event,

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND DENYING DEFENDANTS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT ~ 10

1 a reasonable inquiry should have disclosed the untrue statements.  
2 Sanctions are also warranted under either CR 11 or CR 26(g) for the  
inaccurate and misleading discovery responses.

3 \*\*\*

4 Robinhood is entitled to an award of attorney fees and statutory costs.  
5 ECF No. 43 at 5, ¶ 23.

6 Defendants disagree with the Superior Court's findings, but Defendants do  
7 not dispute the Superior Court in fact made these findings. ECF No. 50 at 32-33, ¶  
8 23.

9 On July 14, 2022, the Superior Court entered an order granting Robinhood's  
10 motion for sanctions, holding that the "federal court's finding that this case was  
11 frivolous from the start is sufficient, standing alone, to warrant CR 11 sanctions."  
12 ECF No. 43 at 6-7, ¶¶ 24, 25. The Superior Court's order included the following  
13 findings of fact showing Mr. Gordon and Defendants signed their names to  
14 numerous filings that violate CR 11:

15 Brian Cameron and Kirk Miller also represented Plaintiff Isaac  
16 Gordon in *Gordon v. Mod Super Fast Pizza, LLC*, Spokane Cnty. Sup.  
17 Ct. Case No. 20-2-00148-32 (filed Jan. 14, 2020), a putative class  
18 action involving a refer-a-friend text message that was allegedly sent  
19 nine minutes before the John Cameron Robinhood text .... Plaintiff  
20 alleged that he received a text message from a user who registered the  
name "Tom Ripley" and the email address 19jkc77@gmail.com....  
This email address includes the initials for John Kenneth Cameron  
and his birth year, 1977, suggesting that John Cameron also sent  
Plaintiff the MOD referral text message ... After MOD brought this  
connection to Brian Cameron's attention, Plaintiff voluntarily  
dismissed his case.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND DENYING DEFENDANTS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT ~ 11

1 \*\*\*

2 Plaintiff's Complaint and Amended Complaint contained statement  
3 that were not well-grounded in fact or warranted by existing law,  
4 including several false statements that the text message Plaintiff  
5 received was "unsolicited" and that he "did not consent" to receive it.

6 \*\*\*

7 After Plaintiff's claim-manufacturing came to light, Plaintiff's counsel  
8 Brian Cameron signed and filed a declaration that included  
9 demonstratable falsehoods, including that, to the best of his  
10 knowledge, Plaintiff "was uncertain as to the identity of the sender of  
11 the [same] text messages at issue when he responded to the  
12 Defendant's discovery requests."

13 \*\*\*

14 CR 11 sanctions are further warranted because any reasonable inquiry  
15 would have involved, at a minimum, reviewing texts between Plaintiff  
16 and the sender. Those texts reveal that Plaintiff knew the sender,  
17 engaged in friendly text message exchanges both before and after the  
18 Robinhood referral text message on which Plaintiff moored his  
19 Complaint, and an online search for the sender's phone number shows  
20 that it belonged to John Cameron, Plaintiff's counsel's brother.  
Counsel's failure to conduct minimal factual investigation is sufficient  
to impose CR 11 sanctions.

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Further, CR 11 sanctions are necessary to deter Plaintiff and his  
counsel from fabricating claims in the future. In addition to Plaintiff's  
counsel's misconduct in the case and in *Gordon v. Mod Pizza*,  
discussed above, Plaintiff's counsel Brian Cameron, Kirk Miller, and  
their law firms have initiated several other CEMA based punitive  
class actions, where plaintiffs claim to have received unsolicited  
commercial electronic text messages that appear similarly suspect.  
Several of those cases were on behalf of plaintiffs alleging that they  
received loyalty program text messages after visiting multiple  
cannabis stores on the same day ... The plaintiff in one of these cases

1 testified at his deposition that Brian Cameron drove him from one  
2 store to the next .... After the misconduct of Brian Cameron and Kirk  
3 Miller came to light in these cases, Brian Cameron and/or Kirk Miller  
4 declined to file the previously served complaints ... or voluntarily  
5 dismissed the cases without prejudice... This is the same tactic  
6 Plaintiff and his counsel employed in this case.

7 *Id.* at 7-8, ¶ 26.

8 Defendants disagree with the truth of these findings but do not dispute that  
9 the Superior Court in fact made these findings. ECF No. 50 at 37-38, ¶ 26.

10 The Superior Court entered sanctions against Mr. Gordon, Mr. Cameron,  
11 individually, Cameron Sutherland, PLLC, Mr. Miller, individually, and Kirk  
12 Miller, P.S. pursuant to CR 11 in the amount of Robinhood's reasonable attorneys'  
13 fees expended in defending the action. ECF No. 43 at 9, ¶ 27.

## 14 **DISCUSSION**

### 15 **I. Summary Judgment Standard**

16 The Court may grant summary judgment in favor of a moving party who  
17 demonstrates "that there is no genuine dispute as to any material fact and that the  
18 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling  
19 on a motion for summary judgment, the court must only consider admissible  
20 evidence. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002). The  
party moving for summary judgment bears the initial burden of showing the  
absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S.

1 317, 323 (1986). The burden then shifts to the non-moving party to identify  
2 specific facts showing there is a genuine issue of material fact. *See Anderson v.*  
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “The mere existence of a scintilla  
4 of evidence in support of the plaintiff’s position will be insufficient; there must be  
5 evidence on which the jury could reasonably find for the plaintiff.” *Id.* at 252.

6 For purposes of summary judgment, a fact is “material” if it might affect the  
7 outcome of the suit under the governing law. *Id.* at 248. Further, a dispute is  
8 “genuine” only where the evidence is such that a reasonable jury could find in  
9 favor of the non-moving party. *Id.* The Court views the facts, and all rational  
10 inferences therefrom, in the light most favorable to the non-moving party. *Scott v.*  
11 *Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted  
12 “against a party who fails to make a showing sufficient to establish the existence of  
13 an element essential to that party’s case, and on which that party will bear the  
14 burden of proof at trial.” *Celotex*, 477 U.S. at 322.

## 15 **II. Judicial Notice**

16 As a threshold matter, Defendants repeatedly assert that the pleadings in the  
17 underlying action are hearsay that this Court may not consider on summary  
18 judgment. *See* ECF Nos. 49, 50.

19 The Court may judicially notice a fact that is not subject to reasonable  
20 dispute because it: (1) is generally known within the trial court’s territorial

1 jurisdiction; or (2) can be accurately and readily determined from sources whose  
2 accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). Federal courts  
3 “may take notice of proceedings in other courts, both within and without the  
4 federal judicial system, if those proceedings have a direct relation to matters at  
5 issue.” *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007).

6 Here, the Court takes judicial notice of the related public federal and state  
7 court records in the underlying litigation. To the extent Defendants dispute the  
8 factual findings and legal conclusions contained therein, the Court does not rely on  
9 them for the truth of the matter asserted. Therefore, the documents do not  
10 constitute hearsay. Fed. R. Evid. 801.

### 11 **III. Insurance Coverage**

12 Plaintiff moves for summary judgment on its declaratory judgment claim  
13 regarding whether Defendants’ claims are covered by the respective insurance  
14 policies issued to Defendants by Plaintiff. ECF No. 41.

15 In a diversity action, federal court apply state substantive law and federal  
16 procedural law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Under  
17 Washington law, courts give insurance policy language its plain meaning,  
18 construing the terms as the average person would. *Robbins v. Mason Cnty. Title*  
19 *Ins. Co.*, 195 Wash. 2d 618, 629 (2020). The party asserting that coverage applies  
20 has the burden to prove the “loss falls within the scope of the policy’s insured

1 losses.” *McDonald v. State Farm Fire & Cas. Co.*, 119 Wash. 2d 724, 731 (1992).  
2 If this burden is met, the insurer bears the burden of showing an exclusion applies.  
3 *Id.* Exclusions are to be strictly and narrowly construed. *Robbins*, 195 Wash. 2d at  
4 629. The interpretation of insurance policy language is a question of law.  
5 *McDonald*, 119 Wash. 2d at 730.

6 Here, both policies contain essentially the same language, where ALPS  
7 agreed “to pay on behalf of [Defendants] all sums (in excess of the Deductible  
8 amount that the Insured becomes legally obligated to pay as **Damages**, arising  
9 from or in connection with a **CLAIM**.” ECF Nos. 43 at 9-14, ¶¶ 30, 35 (citing  
10 ECF Nos. 42-1, 42-2)<sup>2</sup>. “For any **Claim** covered under this **Policy**, the **Company**  
11 shall have the right and the duty to defend such **Claim** even if any or all of the  
12 allegations of the **Claim** are groundless, false or fraudulent, but shall have no  
13 obligation to appoint legal counsel to defend a **Claim** that is not the subject of a  
14 pending civil action, arbitration, or similar proceeding seeking the recovery of  
15 compensatory damages.” ECF No. 42-1 at 4, ¶ B. A “claim” must arise from  
16 “wrongful conduct.” ECF No. 42-1 at 4, ¶ A.

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17  
18  
19 <sup>2</sup> Because the policies are the same regarding the relevant provisions, the  
20 Court will hereinafter cite to the first contract.



1 A “claim” includes “a demand for money or services including, but not  
2 necessarily limited to, the service of suit or institution of arbitration or alternative  
3 dispute resolution proceedings against the Insured.” *Id.* at 5-6, ¶ C. “Wrongful  
4 conduct” is defined as an act, error or omission in **Professional Services** that were  
5 or should have been rendered by the **Insured**.” *Id.* at 10, ¶ BB. In turn,  
6 “professional services” includes an attorney “in an attorney-client relationship on  
7 behalf of one or more clients applying the **Attorney’s** specialized education,  
8 knowledge, skill, labor, experience and/or training, including pro bono services.”  
9 *Id.* at 9, ¶ Y.

10 Because a “claim” is “not necessarily limited to” a traditional complaint, the  
11 Court finds the sanctions and attorney fees qualifies as a “claim” under the policy  
12 as they are a demand for money. *See Robbins*, 119 Wash. 2d at 628. Moreover,  
13 viewing the facts in light most favorable to Defendants, the conduct at issue  
14 involves acts or omissions in the course of professional services in the underlying  
15 class action litigation. Because there is a valid “claim”, ALPS bears the burden  
16 showing an exclusion exists.

17 The parties dispute whether “damages” qualifies as an exclusion. As stated  
18 *supra*, ALPS agreed to pay damages that arise from or in connection with a claim.  
19 “Damages” is defined as any “[m]onetary award by way of judgment or final  
20 arbitration, or any settlement” but does not include “sanctions” or “attorney’s fees

1 or costs.” ECF No. 42-1 at 7, ¶ H. There is also a corresponding exclusion for  
2 “Any dispute over fees or costs, or any **Claim** that seeks, whether directly or  
3 indirectly, the return, reimbursement or disgorgement of fees, costs, or other funds  
4 or property held or controlled at any time by an **Insured**.” *Id.* at 11, ¶ I.

5 First, while Defendants dispute the underlying factual findings and legal  
6 conclusions, Defendants do not dispute that the Superior Court in fact issued an  
7 order granting sanctions in the amount of attorney fees against Defendants. *See*  
8 ECF No. 42-7. Second, Defendants dispute whether “sanctions” exist because  
9 there has yet to be a final judgment on the sanctions. ECF No. 50. Defendants cite  
10 no legal support that “sanctions” exist only where there is a final sum due. To the  
11 contrary, “sanction” is defined as “[o]fficial approval or authorization.” Sanction,  
12 Black’s Law Dictionary (11th ed. 2019). The Superior Court provided official  
13 approval, i.e. sanctioned, Defendants in the amount of attorney fees Robinhood  
14 incurred. *See* ECF No. 42-7. Third, to the extent Defendants assert Plaintiff  
15 “admitted” a duty to defend, the “admission” was based on a hypothetical not  
16 related to the facts of the case. ECF No. 45-1. The Court finds no admission was  
17 made and, in any event, the question of coverage is a question of law.

18 It is undisputed the only claims Defendants asserted involve sanctions and  
19 attorney fees. Under the relevant definition of damages and corresponding  
20 exclusion, the Court finds the conduct at issue is unambiguously outside of the

1 coverage Plaintiff agreed to provide. ECF No. 42-1 at 7, ¶ H. Because this is  
2 dispositive to the determination of coverage, the Court declines to address whether  
3 the separate exclusion applies, i.e. whether Defendants in fact engaged in  
4 dishonest, fraudulent, criminal malicious, or intentionally wrongful or harmful act,  
5 ECF No. 42-1 at 10, ¶ A, which would also be excluded.

#### 6 **IV. Duty to Defend**

7 Relatedly, Defendants move for summary judgment on Plaintiff's duty to  
8 defend. ECF No. 29. "An insurer is not forced to undertake a defense if it believes  
9 the claims asserted against the insured are not covered at all." *Nat'l Sur. Corp. v.*  
10 *Immunex Corp.*, 176 Wash. 2d 872, 887 (2013). Here, Plaintiff denied coverage  
11 and instituted this action for the Court to determine coverage – there are no facts  
12 which suggest Plaintiff was "unsure" there was coverage. *Robbins*, 195 Wash. 2d  
13 at 632. As discussed *supra*, Plaintiff had no duty to defend the action under either  
14 policy. As a result, summary judgment against Defendants on the duty to defend  
15 claim is appropriate.

#### 16 **ACCORDINGLY, IT IS HEREBY ORDERED:**

17 1. Defendants' Motion for Partial Summary Judgment Regarding Duty  
18 to Defend (ECF No. 29) is **DENIED**.

19 2. Plaintiff's Motion for Partial Summary Judgment (ECF No. 41) is  
20 **GRANTED**.

1 The District Court Executive is directed to enter this Order and furnish  
2 copies to counsel.

3 DATED September 30, 2022.



*Thomas O. Rice*  
THOMAS O. RICE  
United States District Judge